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IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUL 6 1971
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October Term, 1971

No. 71-30

GILMAR FORTIS,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STANLEY H. STONE,
530 West 6th Street,
Los Angeles, Calif. 90014,
Attorney for Petitioner.

CROSNER & GOLDFARB,
8447 Wilshire Boulevard,
Beverly Hills, Calif. 90211,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment by the California Supreme Court and the Superior Court of the State of California in the above entitled case.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1254, United States Code, which provides in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Questions Presented.

1. Has the petitioner's right to due process been violated when a plea of *nolo contendere* is accepted by a court and said court is aware that petitioner denied having committed the crime and the Court has not made inquiry to resolve the conflict between the plea and the claim of innocence.

2. Can it be deemed that a defendant has made an intelligent waiver of his constitutional rights and has understood the consequences of his plea when said defendant was not informed that his plea would necessitate immediate deportation?

Constitutional and Statutory Provisions Involved.

The questions presented involve the XIV Amendment to the United States Constitution, Article I, Section 13 to the Constitution of the State of California and Section 241(a)(11) of the Immigration and Naturalization Act.

Statement of Proceedings.

Petitioner was charged in an Information, in the Los Angeles Superior Court, bearing criminal No. A 254,112 Health & Safety, Count II and Count III, Violation of 11910 Health & Safety, and Count IV, Violation of said 11556 Health & Safety.

On March 6, 1970, a Preliminary Hearing was commenced in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, the Honorable Leonard T. Mendelsohn, Judge Presiding, at which time petitioner was held to answer on Count I, unlawful possession of marijuana.

Following the Preliminary Hearing, on March 20, 1970, the petitioner duly appeared in Department 100 of the Superior Court of Los Angeles and wss arraigned.

On April 27, 1970, in Department 101 of the Superior Court, petitioner made a motion under section 995 of the California Penal Code, the respondent Superior Court made an order denying petitioner's motion.

On April 30, 1970, in Department 102 of the Superior Court, the Honorable Arthur L. Alarcon, Judge Presiding, the petitioner withdrew his previously entered plea of Not Guilty, and entered a new and different plea, that of *nolo contendere* to the charge. Following said plea, probation and sentencing was set for July 7, 1970.

On July 7, 1970, in Department 102 of the Superior Court, the Honorable Arthur L. Alarcon, Judge Presiding, the Court imposed sentence as follows: Sentenced the petitioner under 17.5 of the Penal Code, reducing the violation to a misdemeanor and placing the petitioner on summary probation.

On March 3, 1971, in Department 102 of the Superior Court, the Honorable Arthur L. Alarcon, Judge Presiding, the petitioner duly moved the Court to set aside the plea and vacate judgment on the grounds that petitioner was never advised that a plea of *nolo contendere* could and would result in deportation from the United States under Section 241(a)(11) of the Immigration and Naturalization Act: that petitioner misunderstood the nature of the *nolo contendere* plea and the consequences thereof; and that petitioner had always maintained his innocence of said charge. Subse-

quent to argument, said Court entered its Minute Order denying petitioner's motion.

Petitioner filed a Writ of Mandate, Case No. 38077, with the Court of Appeal, Second Appellate District, requesting that the respondent Superior Court be directed to allow the petitioner to withdraw his plea of *nolo contendere* and enter a plea of Not Guilty. The Court of Appeal denied petitioner's request on March 8, 1971, without a hearing.

After the court of appeal denied petitioner's request for a hearing the petitioner filed a Writ of Mandate, Case No. 38077 with the Supreme Court of California requesting that the respondent Superior Court be directed to allow the petitioner to withdraw his plea of *nolo contendere* and enter a plea of Not Guilty. The California Supreme Court denied petitioner's request on April 7, 1971.

REASON FOR GRANTING THE WRIT.

Petitioner's motion to set aside the plea and vacate judgment was based on the premise that the petitioner was never made aware of the nature and consequence of his plea and that he understood a plea of *nolo contendere* to be in essence a submission on the facts to the Court, and not the equivalent to a plea of guilty. Further, said petitioner was sentenced and subsequent to his denial to the Probation Officer prior to his being sentenced, that he in fact committed the violation charged.

The plea and subsequent sentencing were unconstitutional and in violation of the Due Process Clause of the XIVth Amendment of the United States Constitution, and of Article I, Section 13 of the Constitution of the State of California.

Respondent Court has proceeded in excess of its jurisdiction and has abused its discretion to the substantial prejudice of petitioner, in that contrary to the ruling of the respondent Court, the said *nolo contendere* plea and subsequent sentencing were obtained in violation of petitioner's rights guaranteed by the XIVth Amendment of the United States Constitution and of Article I, Section 13 of the California Constitution.

As per the transcript, Exhibit B, pages 20-34 of the plea of *nolo contendere* and Probation and Sentence Report Exhibit A, pages 13-19, the record is clear that defendant never admitted possession of the contraband, and to the contrary it appears that confusion as to the nature of the plea was present throughout the proceedings. Said transcripts are void as to any showing that petitioner was informed that a plea of *nolo contendere* was in essence a plea of guilty. The Probation Department's report, Exhibit A, pages 13-19, reveals petitioner's misunderstanding of the nature of the *nolo contendere* plea by his unequivocal denial of guilt. Presented with such records, the Court further abused its discretion by imposing sentence without a further inquiry into said *nolo contendere* plea, particularly in view of the defendant's education in a foreign country, and his problem with the language.

On October 13, 1970, the Department of Justice, Case No. A 10 761 351, under authority of Section 241(a)(11) of the Immigration and Naturalization moved to have the petitioner deported, as a result of his having pleaded *nolo contendere* to violating the drug laws of the State of California. As a result of the proceeding, the petitioner has been ordered deported March 9, 1971.

On March 3, 1971, petitioner moved to set aside his plea, on the premise that the petitioner was never made aware of the nature and consequence of his plea and that he understood a plea of *nolo contendere* to be in essence a submission on the facts to the Court, and not the equivalent to a plea of guilty. Further, said petitioner was sentenced and subsequent to his denial to the Probation Officer prior to his being sentenced, that he in fact committed the violation charged. See Petitioner's Affidavit filed with the Superior Court March 3, 1971, Exhibit C, pages 28 and 29.

Petitioner's Counsel at the time of his plea stated he never advised petitioner that his plea would result in his immediate deportation. [See attorney's attached Affidavit, Exhibit D, page 30]. In view of the foregoing petitioner makes the following argument.

FACTS.

Petitioner was charged in an Information, in the Los Angeles Superior Court, bearing criminal No. A 254 112, with having marijuana and dangerous drugs in his possession on December 30, 1969, violating Sections 11530, 11910 and 11556 of the California Health and Safety Code.

On April 30, 1970, in Department 102 of the Superior Court, the Honorable Arthur L. Alarcon, Judge Presiding, the petitioner withdrew his previously entered plea of Not Guilty, and entered a new and different plea, that of *nolo contendere* to the charge. [See Exhibit "B", Pages 20-27, Transcript of Waiver of Rights and Petitioner's Change of Plea].

Petitioner met with the probation department July 7, 1970, and denied his guilt. The Probation Officer wrote his report and stated that the petitioner said he was innocent.

The Court read the Probation Report prior to sentencing the petitioner on July 7, 1970 [See Exhibit A, pages 13-19], and sentenced the petitioner.

ARGUMENTS AND POINTS AND AUTHORITIES.

STATEMENT OF REASONS WHY A HEARING SHOULD BE GRANTED.

Points and Authorities.

1. Can a plea of *nolo contendere* be accepted by the Court when said Court is aware that the defendant denied having committed the crime and the Court has not made inquiry to resolve the conflict between the plea and the claim of innocence?

Petitioner contends that prior to a Court accepting a plea of *nolo contendere* from a defendant to the crime he is charged with, where the defendant has protested his innocence, the Court must find that the defendant intelligently concluded that his interests required a guilty plea and there must be some evidence in the record that the defendant is in fact guilty. *North Carolina v. Alford,* 400 U.S. 25, 27 L. Ed. 2d 162 (1970).

In the case at bar, the *nolo contendere* plea by the petitioner necessitated his deportation under Section 241(a)(11) of the Immigration and Naturalization Act. In reality, the petitioner faced no greater consequence by pleading to the crime he was charged with than by being found guilty had he gone to trial. Certainly a man who protests his innocence and then pleads guilty to a charge which necessitates his deportation gains no advantage from his plea and cannot be held to have intelligently waived his rights and understandingly entered his plea. *Brady v. United States,* 397 U.S. 742 (1970).

Petitioner urges the Court to follow the principle as set forth in *North Carolina v. Alford,* 400 U.S. 25, 27 L. Ed. 2d 162 (1970), that when a defendant denies

his guilt and then pleads *nolo contendere,* the Court must make a more precise record that the defendant is doing so voluntarily, knowingly and understandingly. The record in the case at bar is silent and the photocopy of the Declarations attached hereto [Exhibits "C" and "D"], and the transcript of the plea in Los Angeles Superior Court criminal file No. A 254,112, Exhibit B, direct the Court to find that petitioner's plea was not intelligently made and that the respondent Court was duty bound to go into a more in depth inquiry before accepting petitioner's plea. That a plea taken absence of such inquiry violates petitioner's right to Due Process afforded him by the XIVth Amendment to the United States Constitution.

2. Can it be deemed that a defendant has made an intelligent waiver of his constitutional rights and has understood the consequences of his plea when said defendant was not informed that his plea would necessitate immediate deportation?

In re Tahl, (1969) 1 Cal. 3d 122;

Boykin v. Alabama, (1969) 305 U.S. 328.

As per the attached photocopies of Declarations of Gilmar Fortis, Exhibit C, pages 28-29, and his prior attorney, Bernard Patrusky, Exhibit D, Page 30, the originals being in Los Angeles Superior Court criminal No. A 254,112, the record is clear that the defendant was never made aware of the fact that a plea of *nolo contendere* to violation of Section 11530 of the Health and Safety Code of the State of California would necessitate his immediate deportation under Section 241(a)(11) of the Immigration and Naturalization Act.

Clearly, the law under *Boykin* and *Tahl, supra,* necessitates that the accused be advised of the nature of

the charges against him and the consequences of his plea, as well as his constitutional right to confront his accusers, to a trial by jury and his right against self incrimination.

Prior to the *Boykin* and *In re Tahl* cases, *supra*, the Courts held that when an individual was represented by counsel the Court did not have to advise the accused of his plea as it was presumed that his counsel informed him of the consequences of his plea.

> *People v. Loeber*, (1958) 158 Cal. App. 2d 730, 736.

The Court also presumed that in the absence of evidence to the contrary, counsel will perform his duty as an advocate and an officer of the Court and inform the accused of his rights and take steps to protect his rights afforded by law. It is the defendant's contention that based on the declaration of the defendant's prior attorney, and the silent record regarding the nature and consequences of the defendant's plea, that defendant was not made aware of the consequence of his plea.

Certainly, the effect of a deportation order is to expand and increase the petitioner's sentence. In the case of *The United States v. Shapiro*, (1956) 16 F.D.R. 199, the Court held that the effect of a deportation order expanded and increased the sentence imposed on the defendant by the Federal Court by adding thereto the further punishment of banishing him to another country for the rest of his life, and allowed the defendant to withdraw his prior plea of *nolo contendere*. The Court, in its opinion, stated that though under Section 32(d) of the Federal Rules of Criminal Procedure, a motion to withdraw a plea of guilty or *nolo*

contendere may be made only before sentence is imposed or imposition of sentence suspended, however, that in order to correct a manifest injustice the Court, after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In *The United States v. Briscoe,* 432 F. 2d 1351 (1970) Circuit Judge Leventhal recognized that "Deportation" is a penalty and that calculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty; the Court went on to say that, "Under appropriate circumstances the fact that a defendant has been misled as to consequence of deportability may render his guilty plea subject to attack", insofar as a contrary view may be inferred from *United States v. Parrino,* 212 F. 2d 919, 922, on the ground that deportability is only a "collateral consequence of conviction", we agree with "the vigorous dissent of Judge Frank".

Petitioner further contends that the record is unclear that defendant understood the nature of his *nolo contendere* plea. See Transcript of Plea, Exhibit B, pages 20-27. Petitioner contends that the transcript of April 30, 1970 when he pled *nolo contendere,* and the Probation Officer's report, support his contention that he did not understand the nature of his plea. The Petitioner never admitted possession of the contraband, and in view of the petitioner's education in a foreign country and his problem with the language, a more precise showing that the defendant was aware of the nature of his plea should have been made. His misunderstanding of his plea was substantiated by his denial to the Probation Officer prior to his being sentenced that he in fact committed the violation charged.

Petitioner's seeming acquiescence to the conviction and imposition of sentence stemmed from his belief that he had been adjudicated guilty by the Court [See Exhibit C, pages .... and .... Declaration of Petitioner], when in truth and fact defendant had unknowingly pled guilty by entering a plea of *nolo contendere*.

Conclusion.

In view of the foregoing, petitioner contends that he did not intelligently waive his Constitutional Rights, that he did not know the nature and consequences of his plea; that deportation is criminal in nature, and the petition for writ of certiorari should be granted.

Respectfully submitted,

STANLEY H. STONE,
Attorney for Petitioner.

CROSNER & GOLDFARB,
Of Counsel.

EXHIBIT A.

Probation Officer's Report.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff vs. Gilmar Fortis, Defendant.

Filed, July 7, 1970.

Charged with the crime of 11530 H&S (Possession of Marijuana).

Convicted of the crime of same.

Age 33.

Birthdate, 11-21-36.

Race, Span-Amer.

Formal Education, 12th Grade (equivalent)

Age left School, 18.

Marital Status, Single.

Home includes, friends.

No. of Dependents, None.

Occupation, Assembler.

Income per month, $600.

Where Employed, Chrysler Corporation, Commerce.

Health, Good.

Came to State, 11-59.

Came to County, 1962.

Branch Military Service, None.

(As supplied by the defendart and substantiated in part by interested parties.)

The defendant is a 33-year-old male, one of two children born to his parents in San Salvador, El Salvador, Central America. He was reared in the place of his birth by his parents until November, 1959, when he came to the United States. He is registered under

alien registration number A-10-761-351. The defendant remained in San Francisco, California, until 1962, when he came to Los Angeles. The defendant's parents still live in El Salvador, and his father owns a market.

The defendant states that he completed the equivalent of the 12th grade education in San Salvador, graduating at the age of 18, and subsequently securing employment. For four months in 1960, the defendant states that he was employed as a dishwasher at the Franciscan Restaurant, San Francisco, California. He subsequently worked as a construction laborer in and around San Francisco. From January, 1966, to May, 1969, he was employed as a dispatcher at Hillcrest Motors, Beverly Hills, California, earning approximately $475 a month. This job terminated when he was laid off. In September, 1969, he was employed as an assembler by Chrysler Corporation, Slauson and Eastern Avenue in the City of Commerce, earning approximately $150 a week. The defendant states that he was laid off from January 12, 1970, to May 18, 1970, but has been rehired. He has no military service, and states that he is now classified as 1-Y by the Local Draft Board.

The defendant has never been married and denies knowledge of any offspring. He owns a 1969 Karman Ghia, valued at $1,100, which is completely paid for. He now pays $60 a month rent.

The defendant appears to be of average intelligence, and claims to be in good health. He states that he had a hernia operation in 1967, but is now fully recovered. He has no religious affiliations, but admits being an active member in the United Auto Workers, Local 230. In his leisure time he enjoys playing chess.

Narcotics and Intoxicants:

The defendant admits the illegal use of marijuana, stating that he started about a year ago ". . . off and on . . ."

Arrest Record:

Sources of Information:

CII, LACO, FBI.

12-30-69—LAPD—211 PC (Robbery)—This refers to the present offense.

Present Offense:

On December 30, 1969, at approximately 12:00 midnight, the defendant was arrested by officers of the Los Angeles Police Department at 1119 North Madison, Number 17, in Los Angeles, and booked on suspicion of robbery. In the information he was charged with violation of Section 11530 Health and Safety Code (possession of marijuana), one count, and on April 30, 1970, in Department 102, he pleaded nolo contendere. Prior to release on bail, the defendant spent approximately eight days in custody.

Also arrested were Raymond Diaz and Luis Salendra. They are to appear for trial in Department 77 on July 15, 1970.

Upon the information available, the following appear to be the essential facts in this case:

The arresting officers, acting on information regarding narcotic activity, went to 1119 North Madison, number 17, in Los Angeles. The coarrestee, Diaz, opened the door, and the arresting officers smelled a strong odor of burning marijuana. Upon entering, they observed the coarrestee Salendra asleep in the living room and a burning marijuana cigarette in an ashtray.

There were 30 roaches in the ashtray. The defendant (Fortis) was in the bedroom and he was observed sitting up in bed. A check of the headboard drawers revealed two guns and a quantity of seconals. The defendant (Fortis) requested his jacket and the officers recovered an additional quantity of marijuana from his pockets.

Defendant's Statement:

The defendant submitted a one-page typewritten statement, which is quoted in part as follows:

"This letter is a written plea to request leniency regarding my case and conviction.

"I hope you will bear in mind that I will again be gainfully employed as of Monday and that I do have a stable work record. The Company I will be working for, Chrysler Corp., was my former employer and they have reinstated me because of my satisfactory performance and record for them.

"I would also like to note that I will be preparing for my qualifications as a citizen of the United States. I only hope that my conviction will not be detrimental to this goal.

"In closing I would like to request that I seriously be considered for probation and a chance to prove myself as a reliable person. I feel I can do this and I hope that you will give me the opportunity to do so."

Orally, the defendant states that he had an apartment and permitted some of his friends to spend nights there with him. ". . . the police came and woke us up, putting a gun in my friend's face. They searched the place and found some joints in the apartment. They also said there were some anti-American literature in

the place. I found a box of books and brought them up to the apartment . . . one of the guys must have found the marijuana there, I was asleep and knew nothing of it. I wasn't smoking any . . . I don't know, but this is like a nightmare for me . . ."

Interested Parties:

Another reference letter was received in behalf of the defendant, which is quoted in part as follows:

". . . I, Miguel Martinez have known and been close friends with Gil since we were in our early teens in San Salvador. As a matter of fact, he and his family lived across the street from us. Here in the United States we shared an apartment together for all the years prior to my marriage.

"In all of those years of our growing up with the typical teenage daring, and sometimes foolish antics; and even later in our adulthood life, I can honestly say I have never known Gil to have even a minor encounter with the authorities much less one of this nature with which he is presently charged.

"I have found him to be consistently dependable. honest, and a hard worker. I would give him my highest recommendation.

"I wish more of our friends were of his calibre." Signed, Miguel Martinez and Rosemarie Martinez. It is attached.

Several other reference letters are received in behalf of the defendant, which speak highly of him. They are all attached.

Mr. Austin, of the United States immigration and naturalization service, was contacted and states that in view of the defendant's status, deportation proceedings may be initiated.

Evaluation:

The defendant was very courteous during the initial interview, and readily admitted being in the apartment, but denies any participation in the use of marijuana. He admits permitting his companions to use the apartment, but denies any knowledge of marijuana being on the premises. The defendant has displayed ability in the area of employment, and at the present time is gainfully employed.

In view of the absence of any previous police contacts, the probation officer feels that the defendant is a suitable subject for probationary consideration. However, any program of probationary supervision may be interrupted by the United States Immigration and Naturalization Service. It is noted that the defendant has spent eight days in custody and the probation officer feels that a suitable fine as a condition of probation may serve as a continual reminder in the future. Perhaps, he could benefit from counseling in the area of avoiding persons and places that may again bring him into contact with the authorities. He appears to be a suitable subject for probationary consideration, and it is hoped that he will be given the opportunity of remaining within the United States. Therefore, the following recommendation is made.

Recommendation:

It is recommended that probation be granted under the following terms and conditions:

2. Pay a suitable fine through the probation officer.
6. Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.

7. Not associate with known narcotic users or sellers.

11. Not associate with the coarrestees Raymond Diaz and Luis Salendra.

15. Seek and maintain employment as approved by probation officer.

17. Maintain residence as approved by probation officer.

19. Obey all laws, orders, rules and regulations of the Court and Probation Department.

Respectfully submitted,

KENNETH E. KIRKPATRICK,
Probation Officer
By /s/ Basil V. Lewis
BASIL V. LEWIS, Deputy
Central Adult Investigation

(Dictated 6-23-70).
(Received 6-25-70, 8:53 A.M.).

BVL:CS (5)

I have read and considered the foregoing report of the probation officer.

/s/ Arthur L. Alarcon
Judge of the Superior Court

EXHIBIT B.

Superior Court of the State of California, for the County of Los Angeles.

Department No. 102.

Hon. Arthur L. Alarcon, Judge.

The People of the State of California, Plaintiff, vs. Gilmar Fortis, Defendant. No. A 254 112.

REPORTER'S TRANSCRIPT

Thursday, April 30, 1970

LOS ANGELES, CALIFORNIA, THURSDAY, APRIL 30, 1970; 11:50 A.M.

MR. PATRUSKY: Your Honor, in the Fortis matter, there will be a disposition.

THE COURT: Gilmar Fortis?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that your true name, Mr. Fortis?

THE DEFENDANT: Yes, Sir.

THE COURT: In the matter of the People against Gilmar Fortis, the record will show the defendant is present and Counsel is present. Yes, Mr. Patrusky?

MR. PATRUSKY: I'm sorry, your Honor—there will be a plea as to Count I, nolo contendre.

THE COURT: Is that agreeable?

MR. OAKES: That's agreeable with the People, your Honor.

THE COURT: All right.

MR. OAKES: May I take the plea?

THE COURT: Yes, please do.

MR. OAKES: Mr. Gilmar Fortis, your attorney has indicated that you wish to withdraw your plea of not guilty to Count I of Information Number A254112. Is that what you wish to do, Sir?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Have you discussed this matter thoroughly with your attorney?

THE DEFENDANT: Yes, yes.

MR. OAKES: And do you understand, Sir, that in changing your plea from "Not guilty" to "Nolo contendre" you will be giving up your right to a jury trial, or to have this matter tried by the Court? You will also be giving up your right to confront and cross-examine the witnesses that would appear against you if you did try the case. You are also giving up your right to freedom from self-incrimination—that is, you will be incriminating yourself.

You will also be giving up your right to the subpoena power of the Court to subpoena witnesses on your own behalf, and to present the defense in this matter.

Do you understand these rights, and do you understand that you will be waiving and giving up these rights?

THE DEFENDANT: Yes, Sir, I understand.

MR. OAKES: You also understand that if you do have a defense in this case, you will be waiving and giving up your right to present a defense?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Have you discussed the matter of your defense in this case with your attorney, thoroughly?

THE DEFENDANT: Pardon me?

MR. OAKES: Have you thoroughly discussed the matter of your defense with your attorney?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Then, Sir, in connection with your right to have a trial, a jury trial or a trial here in this Court, do you waive and give up that right?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Do you also waive and give up the right to confront and cross-examine the witnesses against you?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Do you waive and give up the right to the subpoena power of the Court to present a defense on your own behalf?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Do you waive and give up the right to self-incrimination, Sir?

THE DEFENDANT: Yes, Sir.

MR. OAKES: You understand that there have been no promises made to you with regard to this violation of the law?

THE DEFENDANT: Yes, Sir.

MR. OAKES: There have been no promises made to you with regard to sentencing or probation or what have you, do you understand that?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Do you understand that his Honor, Judge Arthur L. Alarcon, is the sole judge as to what your sentence will be in this case, and he is not committed to any course?

THE DEFENDANT: I understand that.

MR. OAKES: You also understand that you will have a right to a probation report, and your attorney may make recommendations to the Court, and he will consider those in sentencing you?

THE DEFENDANT: Yes, Sir, I understand.

MR. OAKES: Have there been any threats or any coercion brought against you or any members of your family to induce you to enter this plea?

THE DEFENDANT: No, Sir.

MR. OAKES: And are you entering this plea voluntarily?

THE DEFENDANT: Yes, Sir.

MR. OAKES: Are you entering this plea because, in truth and in fact, on the date of December 30th, 1969, you did have in your possession marijuana?

MR. PATRUSKY: Your Honor, on that, I don't know whether that's appropriate for a plea of nolo contendre. I have explained the effect of a plea of nolo contendre, but I don't know whether this would be an appropriate question under that plea.

THE COURT: Mr. Oakes?

MR. OAKES: Well, your Honor, I believe that for the purposes of this hearing, he is incriminating himself, and we should ascertain whether in fact he is guilty of the crime. If he is not, he is entitled to a defense, and not to a plea of nolo contendre.

THE COURT: I'm not so sure that that's correct, Mr. Oakes.

MR. PATRUSKY: I also wanted to say, at the end of the District Attorney's statement, the plea entails a statement that we do not wish to contest it. I don't think there is any self-incrimination involved, because the defendant is not going to testify in his own behalf. He is waiving his right to testify in his own behalf, and he is waiving his right to challenge the allegations as to the plea to which he enters nolo contendre.

THE COURT: Mr. Chan, do you wish to say something?

MR. OAKES: I will withdraw the last question.

THE COURT: I think you raise a point that has not been made clear by the cases, and we are all in a brand-new area, a revolution in the criminal law. But the plea of nolo contendre is a substitute, an alterna-

tive, to a plea of guilty, and what you asked the defendant to do was to confess. If he wanted to confess, he could plead guilty. So if there is any vitality to the plea of nolo contendre, then the defendant should not be required to confess.

It places the Court and the District Attorney in a peculiar position, but it is an alternative that the legislature has given the defendant.

MR. OAKES: I will rephrase my question.

THE COURT: Just let me finish my statement as to Mr. Patrusky's comment.

It is true that the defendant is not saying that he is guilty. But when he pleads nolo contendre, if we follow the philosophy of the Supreme Court of California in the Moseley Case, by not denying his guilt, he in effect is—by remaining silent—in effect is a consciousness of guilt or an implication that the charges are sufficient to cause him to be punished.

So in that particular sense, he is in effect, waiving his privilege against self-incrimination, in that by remaining silent in the face of a charge as to which he says, "I do not contest it," it is in effect a form of consciousness of guilt which the Court can consider, and that society can then punish.

So in that strained interpretation of the Fifth Amendment, he is in that sense, incriminating himself.

Do you wish to comment on it, Mr. Patrusky?

MR. PATRUSKY: No.

THE COURT: If you read In re Moseley, I think it will become clear to you.

MR. PATRUSKY: Okay.

MR. OAKES: I will rephrase that question.

THE COURT: All right.

MR. OAKES: Mr. Fortis, you are aware, Sir, that you are charged with possession of marijuana on the date of December 30th, 1969, and that you knew that it was marijuana, and that it was illegal to possess it. You are aware that you are charged with that?

THE DEFENDANT: Yes, Sir.

MR. OAKES: And it is your desire not to contest those charges, is that correct?

THE DEFENDANT: Yes, Sir.

MR. OAKES: And that is why you are entering the plea of nolo contendre?

THE DEFENDANT: Yes, Sir.

THE COURT: You also understand that you have a right to contest those charges, and to have a trial, so that the D.A. will be required to put on evidence, if he has evidence, to try to support those charges. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: So that you further understand, then by pleading nolo contendre, you are giving up your right to have a trial at all, giving up a right to defend yourself, and giving up the right to make the D.A. prove each one of the charges he has made against you.

THE DEFENDANT: Yes, your Honor.

THE COURT: Understanding all of that, do you still wish to plead nolo contendre?

THE DEFENDANT: Yes, Sir.

THE COURT: All right, take the plea.

MR. OAKES: Mr. Gilmar Fortis, as to Information Number A254112. Count I, how do you plead, no guilty, guilty, or nolo contendre?

THE DEFENDANT: Nolo Contendre.

MR. OAKES: Thank you.

THE COURT: The defendant having entered a plea of nolo contendre to Count I of the Information, this matter will be placed on the Court's calendar for hearing on the defendant's application for probation.

MR. PATRUSKY: Your Honor, I think I apprised the Court that I would be leaving at the end of May. I'm wondering if it is at all possible to put over the hearing on the probation and sentence until sometime after the first week in July.

THE COURT: Do you have any objection, Mr. Oakes?

MR. OAKES: No objection, your Honor.

THE COURT: All right. Let's get the first available date you can, Mr. Patrusky.

MR. PATRUSKY: The 7th or the 8th, 9th or 10th.

THE COURT: 7th. All right, Mr. Fortis, you are entitled to have judgment and sentence pronounced within 21 days of your plea of nolo contendre. But you can give up that right and have that hearing at a date which is beyond 21 days. Do you understand that right?

THE DEFENDANT: Yes, Sir.

THE COURT: And at this time, do you wish to give up your right to have judgment and sentence pronounced, or your application for probation considered, within 21 days, and do you consent to this matter being heard on July 7, which is the date your attorney wants?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. At the request of the defendant, the matter will be heard on July 7, on his application for probation, and for judgment and sentence at to Count I.

What about Count II, Mr. Chan? Mr. Oakes?

MR. CHAN: Stipulate that Count may go over to the date of probation and sentence.

THE COURT: Count II will be continued to July 7 at 9 A.M.

MR. PATRUSKY: What time is that, your Honor?

THE COURT: 9 A.M.

(The Court considered other unrelated matters.)

THE COURT: Mr. Oakes, in the Fortis matter, we have to indicate for the record that you approved the nolo contendre plea. Do you approve it?

MR. OAKES: Yes, your Honor, the People approve the nolo contendre plea.

THE COURT: So does the Court.

(Proceedings concluded.)

———

EXHIBIT C.

Declaration of Gilmar Fortis.

I, GILMAR FORTIS, declare as follows:

1. That I was the defendant in Superior Court criminal case No. A-254,112, charged with a violation of §11530 of the Health and Safety Code of the State of California.

2. That on April 30, 1970, I entered a plea of Nolo Contendre, and on July 7, 1970, sentence was pronounced.

3. That I was never advised that a plea of Nolo Contendre could and would result in deportation from the United States under Section 241(A) (11) of the Immigration and Naturalization Act.

4. That a Deportation Proceeding has been initiated by the United States Department of Justice, case No. A10 761 351, and that I am in imminent danger of immediate deportation.

5. That I legally entered the United States on November 22, 1959, and have continually since said time been gainfully employed, and have had no prior police department or other law enforcement contacts.

6. That I did not understand that a plea of Nolo Contendre was in essence a plea of guilty, and instead believed Nolo Contendre to be equivalent to a submission of the facts of the case to the trial Judge for his consideration.

7. I have repeatedly denied any knowledge of guilt to said charge, as can be further verified from my statements given to the Probation Officer, which is incorporated in his report on file with this Court, and which was submitted to the Court prior to sentencing.

8. In truth and in fact I am not guilty of this charge, and never would have even submitted the matter to the trial Court's consideration if I had been aware of the immediate deportation penalties.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Beverly Hills, California, this 24th day of February, 1971.

/s/ Gilmar Fortis
Gilmar Fortis

EXHIBIT D.

Declaration of Bernard Patrusky.

I, BERNARD PATRUSKY, declare as follows:

1. That I am an attorney at law duly authorized to practice as such in the Courts of the State of California.

2. That I represented GILMAR FORTIS in criminal case No. A254,112, and declare that I never informed MR. FORTIS that a plea of Nolo Contendre to Health and Safety Section 11530 would necessitate his immediate deportation from the United States under Section 241(A)(11) of the Immigration and Naturalization Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 1971, at Los Angeles, California.

/s/ Bernard Patrusky
BERNARD PATRUSKY

POINTS AND AUTHORITIES

I.

A PLEA OF GUILTY OR NOLO CONTENDRE NECESSITATES A PRECISE SHOWING THAT THE ACCUSED WAS MADE AWARE OF HIS RIGHT TO CONFRONT HIS ACCUSERS, HIS RIGHT TO A JURY TRIAL, HIS RIGHT AGAINST SELF-INCRIMINATION, AS WELL AS THE *NATURE AND CONSEQUENCES OF HIS PLEA.*

In re Tahl (1969), 1 C.3rd 122;

Boykin v. Alabama (1969) 305 U. S. 238

As per the attached declarations, the record is clear that the defendant was never made aware of the fact that a plea of Nolo Contendre to violation of §11530 of the Health and Safety Code of the State of California would necessitate his immediate deportation under §241(A)(11) of the Immigration and Naturalization Act.

Clearly, the law under *Boykin* and *Tahl,* supra, necessitates that the accused be advised of the nature of the charges against him *and the consequence of his plea,* as well his constitutional right to confront his accusers, to a trial by jury and his right against self incrimination.

Prior to the *Boykin* and *In Re Tahl* cases, supra, the Courts held that when an individual was presented by counsel the Court did not have to advise the accused of the consequences of his plea as it was pre-

sumed that his counsel informed him of the consequences of his plea.

People v. Loeber (1958) 158 C.A.2d 730, 736.

The Court also presumed that in the absence of evidence to the contrary, counsel will perform his duty as an advocate and an officer of the Court and inform the accused of his rights and take steps to protect his rights afforded by law.

It is the defendant's contention that based on the declaration of the defendant's prior attorney, BERNARD PATRUSKY, and the silent record regarding the nature and consequence of the defendant's plea, that defendant was not made aware of the consequence of his plea.

II.

THE EFFECT OF A DEPORTATION ORDER IS TO EXPAND AND INCREASE THE SENTENCE.

In the case of the *United States v. Shapiro* (1956) 16 F.D.R. 199, the Court held that the effect of a deportation order *expanded and increased the sentence* imposed on the defendant by the Federal Court by adding thereto the further punishment of banishing him to another country for the rest of his life, and allowed the defendant to withdraw his prior plea of Nolo Contendre. The Court, in its opinion, stated that though under §32(d) of the Federal Rules of Criminal Procedure, a motion to withdraw a plea of Guilty or Nolo Contendre may be made only before sen-

tence is imposed or imposition of sentence suspended, however that in order to correct a manifest injustice the Court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea.

III.

RECORD UNCLEAR THAT DEFENDANT UNDERSTOOD THE NATURE OF HIS PLEA OF NOLO CONTENDRE.

Defendant contends that the transcript of April 30, 1970, when he pled Nolo Contendre, and the Probation Officer's report, support his contention that he did not understand the nature of his plea. On April 30, 1970 (see Reporter's Transcript, p. 2-10) the defendant pled Nolo Contendre to §11530 of the Health and Safety Code. However, the defendant never admitted possession of the contraband and the Court indicated to defense counsel (R. T. p. 6, April 4, 1970) that his silence can be consciousness of guilt. However, in view of the defendant's education in a foreign country and his problem with the language, a more precise showing that the defendant was aware of the nature of his plea should have been made. His misunderstanding of his plea was substantiated by his denial to the Probation Officer *prior to his being sentenced* that he in fact committed the violation charged.

Defendant's seeming acquiescence to the conviction and imposition of sentence stemmed from his belief that he had been adjudicated guilty *by the Court* (see attached Declaration), when in truth and in fact de-

fendant had unknowingly pled guilty by entering a plea of Nolo Contendre.

In view of the foregoing, the defendant respectfully requests that he be allowed to withdraw his prior plea of Nolo Contendre and enter a new plea of Not Guilty.

Respectfully submitted,

CROSNER & GOLDFARB
By /s/ Stuart Goldfarb
Stuart Goldfarb

EXHIBIT E.

BEST AVAILABLE COPY

Defendant F/A to witness. Court orders
B/W - issued & held. Matter
is continued to Aug 17, 1970 9Am
and Dismissed to Dept 17 Defts Diss
B/W/I (C DR
AUG 17 1970 #1 m/o/Defts matter trailed to 8/18/70 9Am for
trial.

AUG 18 1970 #1 m/o/Defts matter cont'd 9/14/70 9Am for
trial. Stip for judge Pro Tem filed! OR

SEP 14 1970 #1 m/o/Defts cont'd 10/20/70 9Am for trial (Ten Mo Rule)
T/w

10/20/70 #1 m/o/Defts cont'd 11/4/70 9Am trial. OR.

NOV 4 1970 #1 " " " 11/9/70 9Am trial P/W/T OR

11/9/70 #1 P/W for SAT Found guilty TO, 11556 WIC
- Waived R/C & T. P's 12/4/70 11 Am

Defendant: It appearing to court that
Counsel would be late
on Dept 102 was not Prepared. It is
ordered that the MC of
Prepared to follow; Deft Louis A Sola
failing to appear for trial, court
orders OR revoked & he and B/C issue
12/4/70 #1 P's dept not present B/W/Bail
until 12/15/70 9Am
12/15/70 #1 B/W no executed. P's Motion denied
Cont 10 days

P's

02 FEB 11 1971 Pltfs Motion for a Continuance of Trial now heard in Dept
Order Court Reporter to prepare an Original and 2 Copies of proc
held on April 30, 1971. Defts motion to dismiss pltfs action is
02 MAR 3 1971 ordered set for hearing on defts motion to set aside dismissal of pltfs ac
and set aside of dismissal of defts cross-complaint filed on Dec 2
is ordered set for hearing on Motion

Pltfs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY

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SUPREME COURT, U. S.

Supreme Court, U.S.
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1971
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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-30

GILMAR FORTIS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

EVELLE J. YOUNGER,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

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On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

Preliminary Statement

Petitioner seeks a writ of certiorari from this Court to the California Supreme Court to review its order denying petitioner's petition for hearing following the order of the California Court of Appeal, Second Appellate District, denying petitioner's petition for writ of mandate to compel the Los Angeles Superior Court to permit petitioner to set aside his plea of nolo contendere and enter a plea of not guilty to a charge of possession of marijuana. None of the California courts issued a written opinion in denying petitioner's applications.

The Petition for Writ of Certiorari was filed on July 6, 1971.

Jurisdiction

Jurisdiction is invoked apparently pursuant to Title 28, United States Code, section 1257(3).

Questions Presented

The Petition raises the following questions:

1. Whether petitioner's right to due process of law was violated by the trial court's acceptance of petitioner's plea of nolo contendere without resolving the conflict between that plea and petitioner's known claim of innocence.

2. Whether petitioner, an alien, waived his constitutional right to trial intelligently and with understanding of the consequences of his plea, when he was not made aware that his plea would necessitate his immediate deportation from the United States.

Statement of the Case

A. History of the Case[1]

In an information filed by the District Attorney of Los Angeles County on March 10, 1970, petitioner, together with Raymond Diaz and Louis Salandra, was charged in Count I with the felony of possession of marijuana in violation of California Health and Safety Code section 11530. In Count II of the information Diaz and Salandra were charged with the misdemeanor of knowingly being in a place where narcotics were

---

[1]Since petitioner sought review in the state courts by writ rather than by appeal, a record was never prepared for the California appellate courts. Therefore, the instant Brief of Respondent in Opposition contains no citations to a record; reference is made by respondent to orders appearing in the files of the Los Angeles Superior Court in *People v. Fortis*, No. A254112, and in the files of the California Court of Appeal, Second Appellate District, in *Fortis v. Superior Court*, 2d Civ. 38077.

being used, a violation of California Health and Safety Code section 11556.

Following a preliminary hearing at which petitioner was held to answer, he pleaded not guilty. Petitioner moved unsuccessfully to set aside the information pursuant to California Penal Code section 995. Thereafter petitioner, with the consent of the prosecuting attorney and the trial court, withdrew his plea of not guilty and entered a plea of nolo contendere.[2]

After ordering and reading a probation report, the court on July 7, 1970, declared the offense a misdemeanor pursuant to California Penal Code section 17, suspended the proceedings, and placed petitioner on probation for a period of three years. Among the conditions of probation was that petitioner pay a fine of $300 plus penalty assessment.

On March 3, 1971, the matter came on calendar before the trial court for hearing on petitioner's motion to set aside his plea of nolo contendere, and the trial court denied the motion.

On March 5, 1971, petitioner filed a petition for writ of mandate in the California Court of Appeal, Second Appellate District. (*Fortis v. Superior Court,* 2d Civ. 38077.) On March 8, 1971, Division Four of that court entered the following order, without written opinion: "Denied. See probation report and reporter's transcripts in superior court file."

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[2]Among the pleas permitted by California law is that defined as follows by California Penal Code section 1016(3): "Nolo contendere, subject to the consent of the district attorney and with the approval of the court. The legal effect of such plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."

On March 18, 1971, petitioner filed a petition for hearing in the California Supreme Court seeking review of the order of the California Court of Appeal. The Petition for Hearing was denied on April 7, 1971, without written opinion.

Petitioner seeks certiorari to the California Supreme Court to review its order denying a hearing.

B. Statement of Facts[3]

Petitioner was born in 1936 in the country of El Salvador where, after completing twelve years of schooling, he resided until 1959, when he came to the United States. He is presently registered as an alien.

"*Present Offense:*

"On December 30, 1969, at approximately 12:00 midnight, the defendant was arrested by officers of the Los Angeles Police Department at 1119 North Madison, Number 17, in Los Angeles, and booked on suspicion of robbery. In the information he was charged with . . . possession of marijuana. . . .

"Also arrested were Raymond Diaz and Luis Salandra. . . .

". . . .

"The arresting officers, acting on information regarding narcotic activity, went to 1119 North Madison, number 17, in Los Angeles. The coar-

[3]The only reference in the Superior Court proceedings to the underlying facts of the case appears in the probation officer's report, which is part of the file in *People v. Fortis,* Los Angeles Superior Court No. A254112. The foregoing Statement of Facts is taken from that report, which is set forth in its entirety as Exhibit A to the Petition for Writ of Certiorari. The transcript of the preliminary hearing in municipal court provides a more complete record of the underlying facts.

restee, Diaz, opened the door, and the arresting officers smelled a strong odor of burning marijuana. Upon entering they observed the coarrestee Salandra asleep in the living room and a burning marijuana cigarette in an ashtray. There were 30 roaches in the ashtray. The defendant (Fortis) was in the bedroom and he was observed sitting up in bed. A check of the headboard drawers revealed two guns and a quantity of seconals. The defendant (Fortis) requested his jacket and the officers recovered an additional quantity of marijuana from his pockets.

"*Defendant's Statement:*

"The defendant submitted a one-page typewritten statement, which is quoted in part as follows:

" 'This letter is a written plea to request leniency regarding my case and conviction.

" 'I hope you will bear in mind that I will again be gainfully employed as of Monday and that I do have a stable work record. The Company I will be working for, Chrysler Corp., was my former employer and they have reinstated me because of my satisfactory performance and record for them.

" 'I would also like to note that I will be preparing for my qualifications as a citizen of the United States. I only hope that my conviction will not be detrimental to this goal.

" 'In closing I would like to request that I seriously be considered for probation and a chance to prove myself as a reliable person. I feel I can do this and I hope that you will give me the opportunity to do so.'

"Orally, the defendant states that he had an apartment and permitted some of his friends to spend nights there with him. '. . . the police came and woke us up, putting a gun in my friend's face. They searched the place and found some joints in the apartment. They also said there were some anti-American literature in the place. I found a box of books and brought them up to the apartment . . . one of the guys must have found the marijuana there, I was asleep and knew nothing of it. I wasn't smoking any . . . I don't know, but this is like a nightmare for me . . .'" (*See* Petition, pp. 13-17.)

ARGUMENT

Petitioner's Plea of Nolo Contendere to a Charge of Possession of Marijuana Was Not Rendered Constitutionally Invalid by the Trial Court's Awareness That Petitioner Denied Committing the Offense or by Petitioner's Unawareness That His Plea Would Necessitate His Immediate Deportation From the United States

Petitioner challenges the validity of both his initial plea of nolo contendere[4] and the trial court's subsequent order refusing petitioner leave to withdraw that plea and enter a plea of not guilty.

As indicated in the probation report, from which the above Statement of Facts is taken, petitioner is a native of the country of El Salvador, having entered the United States some twelve years ago, and is presently registered as an alien.

The record[5] indicates that with reference to the present charge of possession of marijuana, petitioner on April 30, 1970, with the permission of the trial court and the prosecuting attorney, withdrew his plea of not guilty and entered a plea of nolo contendere after discussing the matter with his attorney and after expressly waiving his right to jury trial, to confront and cross-examine witnesses to freedom from self-incrimination, and to present a defense and subpoena witnesses on his behalf. Petitioner stated on the record that no promises, threats, or coercion had been directed to him regard-

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[4]The legal significance of such a plea is indicated in footnote 2, *infra. See also North Carolina v. Alford,* 400 U.S. 25, 35-36 (n. 8).

[5]A reporter's transcript of the proceedings on April 30, 1970, is part of the record in the Los Angeles Superior Court. That transcript is reproduced as Exhibit B to the Petition for Writ of Certiorari.

ing sentencing or probation, that he knew that the trial court would make the sole determination as to his sentence, and that his plea was being entered voluntarily.

However, petitioner declined to state that he was entering his plea for the reason that he had in fact been in possession of marijuana as charged; instead he stated that the plea of nolo contendere was being entered because he desired not to contest the charge. In his subsequent statement to the probation officer, petitioner affirmatively denied guilt of the charged offense.

Subsequently the following proceedings took place before the trial court on July 7, 1970, after probation was granted with the consent of the prosecuting attorney:[6]

> "Mr. Patrusky [petitioner's attorney]: . . . .
>
> "One additional matter, and this is something I discussed with Mr. Pachtman [the prosecuting attorney] prior to the disposition of this matter, because of the defendant's status as an alien.
>
> "Your Honor will recall from the report the defendant has been living in the United States since 1959. He is preparing for a citizenship [*sic*]. Mr. Kirkpatrick's report, the last line prior to the recommendation, indicates the probation officer's own desire to see the defendant remain within the United States.
>
> "It is for that reason that I request the Court to declare this to be a misdemeanor. I have discussed this with Mr. Pachtman at the time we read

---

[6]The following proceedings are taken from the reporter's transcript of that date, which transcript is part of the Superior Court file. This transcript is not among the portions of the record appended to the instant Petition.

> the probation report and he indicated he would have no objection to the Court making such a declaration."

Thereafter with the consent of the prosecuting attorney the trial court fixed the offense as a misdemeanor, and petitioner was placed on probation.

Several months later petitioner moved the trial court for leave to withdraw his plea of nolo contendere. In support of his motion he and his attorney filed declarations under penalty of perjury (Appendices C and D to the instant Petition) which stated that petitioner was lawfully in the United States, was gainfully employed, had never been charged with other violations of the law, was innocent of the present charge and had always maintained his innocence, and had never been advised that his plea of nolo contendere "could and would result in deportation" pursuant to Title 8, United States Code, section 1251(a)(11).

Petitioner further stated in his declaration that "a Deportation Proceeding has been initiated by the United States Department of Justice, case No. A10761351, and that I am in imminent danger of immediate deportation." (Petition, p. 28.) Petitioner's present counsel has indicated that these deportation proceedings are being stayed pending determination of the present Petition for Writ of Certiorari.

Section 1251(a)(11) provides in part that:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> "(11) is . . . or . . . who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . ."

The aforementioned portions of the record indicate affirmatively that petitioner made a knowing and intelligent waiver of his constitutional rights when he entered his plea of nolo contendere. (*See* Petition, pp. 20-27.) There clearly was complete compliance with the requirements set forth in *Boykin v. Alabama*, 395 U.S. 238, with regard to the taking of a plea.

The record shows that petitioner, his counsel, the prosecuting attorney, and the trial court were all aware of the possibility of deportation. The trial court took that possibility into account in fixing petitioner's offense as a misdemeanor. That some or all of the various parties might have labored under the mistaken impression that a misdemeanor conviction would not result in deportation cannot deprive the proceedings of validity under due process standards. This is particularly so in view of the clear indication that petitioner consulted with counsel prior to entering his plea.

Petitioner apparently would seek to have this Court require that any trial judge having reason to believe that a defendant is an alien, include in the *Boykin* admonition advice that such a defendant may be deported if convicted upon his plea.

The *Boykin* opinion of course says nothing about such advice. *Boykin's* requirements certainly encompass the basic constitutional rights which an ordinary defendant will be relinquishing upon entering a plea, and it would be impossible for a trial court to envisage every possible consequence of the defendant's proposed plea. If petitioner is correct, it might well be required that trial courts give other admonitions related to the various penalties and disabilities which might attend the conviction of particular defendants. Such ad-

monitions might then have to include matters such as loss of professional or vocational license, and loss of government or defense-industry job clearance.

Clearly this would be an impossible burden to impose upon trial courts and prosecutors. Moreover, it is questionable what would be accomplished by such admonitions. Unlike perhaps the matter of one's courtroom rights, the possibility of deportation must clearly be in mind when an alien enters a plea of guilty or nolo contendere to a criminal charge. So would the other consequences, given above by way of example, be in mind upon the making of a plea of guilty or nolo contendere.

Although the federal courts are split as to whether the unavailability of parole is a consequence of which a defendant must be informed prior to entering his plea of guilty, *see Bye v. United States*, 435 F.2d 177, 179-80 (2d Cir. 1970), and cases cited; *Trujillo v. United States*, 377 F.2d 266, 268-69 (5th Cir. 1967), *cert. denied*, 389 U.S. 899, it has been held that loss of passport and right to travel abroad is not such a consequence, *Meaton v. United States*, 328 F.2d 379, 380-81 (5th Cir. 1964), *cert. denied*, 380 U.S. 916, nor discharge from military service, *Redwine v. Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1963), loss of right to vote, *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963), or being barred from litigating the issue of civil tax fraud. *United States v. Carlino*, 400 F.2d 56, 57 (n.1) (2d Cir. 1968), *cert. denied*, 394 U.S. 1013.

On the specific issue whether deportation is a consequence of conviction that a defendant must have in mind in deciding to enter a plea of guilty, the Second

Circuit, United States Court of Appeals, in a split decision, held as follows:

> "Generally in criminal cases, the defendant's surprise as to the severity of sentence imposed after a plea of guilty, standing alone, is not such manifest injustice as to require vacation of the judgment and permission to withdraw a plea of guilty. True, when surprise stems from a misunderstanding, reasonably entertained, of remarks by the Judge himself . . . or from assurances by the United States Attorney, it may be ground for post-conviction relief. But surprise, as in the instant case, which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.
>
> "Moreover, here the subject-matter of the claimed surprise was not the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely, deportability. This is a liability which may, and in this case does, depend on a conviction of crime. But it is nonetheless a collateral consequence of conviction. It is true that many statements in judicial opinions and by text-writers may be found —and the appellant here cites several such—to the general effect that a defendant should not be holden to a plea of guilty made without an understanding of the consequences. But neither the generalities found in the texts nor the facts underlying such judicial opinions suggest that the authors of such statements meant to imply that the finality of a conviction on a plea of guilty depended upon a contemporaneous realization by

the defendant of the collateral consequences thereof. Certainly, the appellant fails to cite a single case so holding. And research of our own fails to disclose a case even intimating a rule of such breadth.

". . . .

"We do not fail to recognize the terrific impact on the defendant's life and family of the collateral consequence of deportation. But deportability is determined by the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1102 et seq. And even if we felt that the inflexibility of that Act was unduly harsh in its application to this particular defendant or to others, we may not properly let sympathy, thus engendered, by intrusion into the field of criminal administration disturb the finality of criminal process and thus undermine effective law enforcement." (Citations and footnotes omitted.)

United States v. Parrino, 212 F.2d 919, 921-22 (2d Cir. 1954), *cert. denied,* 348 U.S. 840.

But cf. Vizcarra-Delgadillo v. United States, 395 F.2d 70, 74 (9th Cir. 1968) (Browning, J., dissenting), *cert. dismissed,* 393 U.S. 957;

United States v. Shapiro, 16 F.R.D. 499, 501 (E.D. Wisc. 1955), *appeal dismissed,* 222 F. 2d 836 (7th Cir. 1955).

In *United States v. Briscoe,* 432 F.2d 1351, 1353-54 (D.C. Cir. 1970), the court held that "the fact that a defendant has been *misled* as to consequence of deport-

ability may render his guilty plea subject to attack" (emphasis added), and furthermore that

> "Calculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty, and any *actions by Government counsel* that create a misapprehension as to that likelihood may undercut the voluntariness of the plea." (Emphasis added.)

The court went on to distinguish the case before it, noting the absence of any actions by the prosecuting attorney or the trial court which might have misled the defendant with respect to the consequence of deportation following his conviction upon a plea of guilty.

Similarly in the case at bar there is nothing to indicate that the trial court or the prosecuting attorney in any way misled petitioner.

This Court has held that a plea of guilty will not be held invalid merely because the defendant is motivated to accept the certainty or probability of a lesser penalty rather than face the possibility of acquittal or on the other hand the higher penalty authorized by law. *Brady v. United States*, 397 U.S. 742, 751. Furthermore, the fact that defense counsel may have failed to advise petitioner, or may have incorrectly advised petitioner, as to the consequences of petitioner's projected plea of guilty does not invalidate the plea. *McMann v. Richardson*, 397 U.S. 759, 769-71, 774; *Parker v. North Carolina*, 397 U.S. 790, 796-98.

Petitioner's claim that his plea was rendered constitutionally invalid by the trial court's awareness that petitioner denied committing the offense, is without merit in light of this Court's decision in *North Carolina v. Alford*, 400 U.S. 25.

In that case the Court noted:

> "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.*, 37.

The Court in the *Alford* case found it immaterial whether upon entering his plea the defendant refused to admit commission of the offense or on the other hand entered his plea with an affirmative protestation of innocence. Nor did the Court view as significant whether the plea was one of not guilty as opposed to nolo contendere. *Id* 37.

The Court held:

> "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." (Footnote omitted.) *Id.*, 38.

Similarly in the case at bar, the probation report, portions of which are set forth in the Statement of Facts herein, reflects a strong factual basis for petitioner's conviction even though that report was prepared subsequent to the entry of petitioner's plea. The facts indicate a strong likelihood that petitioner was indeed in unlawful possession of marijuana at the time of his arrest.

Respondent submits that petitioner's plea was constitutionally valid at the time it was entered and that petitioner had no right to withdraw that plea at the subsequent hearing.

Conclusion

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

EVELLE J. YOUNGER,
Attorney General of the State of California.

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

Attorneys for Respondent.